

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALI MUSAID AHMED MUTHANA,

Defendant-Appellant.

UNPUBLISHED

March 9, 2001

No. 218486

Kent Circuit Court

LC No. 98-003755-FC

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, kidnapping, MCL 750.349; MSA 28.581, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). This case arises from a domestic dispute that resulted in the shooting death of Omer Ibrahim and the wounding of his daughter, Tarza. At the time, Tarza was defendant's wife. Defendant was sentenced to concurrent prison terms of life imprisonment for his first-degree murder conviction, 20 to 30 years for his assault conviction, and 5 to 10 years for his kidnapping conviction. These sentences are preceded by three concurrent two-year terms for defendant's felony-firearm convictions. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict with respect to the charge of first-degree premeditated murder because the evidence offered by the prosecution at trial was insufficient to establish that Omer Ibrahim's killing was premeditated and deliberate. We disagree. "In reviewing a trial court's decision regarding a motion for a directed verdict, this Court views the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt." *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). The elements of premeditation and deliberation, which "require sufficient time to allow the defendant to take a second look . . . may be inferred from all the facts and circumstances surrounding the killing." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). "Circumstantial evidence and reasonable inferences drawn from the evidence may constitute

satisfactory proof of the elements of a crime.” *People v Marsack*, 231 Mich App 364, 371; 586 NW2d 234 (1998).

Testimony at trial indicated that defendant had on numerous occasions before the shootings threatened to kill members of the Ibrahim family if he was not allowed to marry Tarza. Further, Tarza testified that on the day of the killing defendant had become angry with her over a shirt she had chosen to wear to school. Later that day, Tarza told both school officials and the police that defendant was both verbally and physically abusive. After the police refused to allow defendant to see his wife at the school, releasing her instead to the care of her father, defendant followed the Ibrahims back to their apartment. There, he argued with both the victim and Tarza concerning Tarza’s comments to school officials. Both Tarza and her younger sister Rhoza testified that when their father refused to permit defendant to take Tarza, defendant became extremely agitated and threatened their father with a kitchen knife. The sisters further testified that after their father indicated to defendant that he was not afraid, defendant stated, “We’ll see,” before throwing the knife to the floor and leaving the apartment.

Tarza also testified that when defendant returned to the apartment approximately one hour later he told everyone to sit down before asking her father as to who had told Tarza to tell her teachers about their private life. After her father responded that no one had encouraged Tarza to do so and that she would not be permitted to leave with defendant, defendant stood and fired three shots from a previously unseen handgun and in doing so struck and killed Omer.

Tarza testified that this gun was the same weapon she had previously seen stored in the bedroom closet of the apartment she shared with defendant. Tarza also testified that upon returning to that apartment several days after the shootings, she found a large bag filled with bullets lying on defendant’s bed, which she stated had not been on the bed when she left the apartment for school on the morning before the shootings.

We believe this evidence is sufficient to establish that defendant acted with premeditation and deliberation when killing Omer Ibrahim. *Id.* at 371. Accordingly, we conclude that the trial court did not err in denying defendant’s motion for a directed verdict on the charge of first-degree premeditated murder. *Crawford, supra* at 615-616.

Defendant next argues that there was insufficient evidence to support his conviction of assaulting Tarza with the intent to murder. More specifically, defendant claims that the prosecution failed to present evidence sufficient to establish that he acted with the requisite specific intent to kill.¹ In doing so, defendant argues that the evidence at trial indicated that Tarza was shot merely by happenstance as she ran toward her father after defendant began rapidly firing his weapon. Again, we disagree.

“When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and

¹ “The elements of the crime of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992).

determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). “Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Tarza testified that at the time defendant began firing his weapon, he was seated in a chair directly across from Omer, while she was seated two chairs to Omer’s left. After defendant fired two shots at her father, Tarza stated he turned and looked directly at her and fired an additional shot at her. Although on appeal defendant attempts to characterize each of these three shots as having been fired haphazardly in rapid succession, Tarza specifically contradicted that proposition at trial, testifying that defendant fired twice at her father before turning and then firing at her as she arose from her chair and attempted to move toward her father. When addressing an issue concerning the sufficiency of evidence, this Court will not interfere with the jury’s role of determining the weight or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). All conflicts in the evidence are resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Additionally, a crime scene technician who preserved the scene after the shootings testified that based upon the location of bullet holes found in the walls of the Ibrahim apartment, after firing at Omer Ibrahim, defendant would have had to alter his direction of fire by more than eleven feet in order to strike Tarza.

We believe that this evidence, when viewed in connection with Tarza’s testimony concerning the unstable nature of her marriage to defendant as well as defendant’s previous threats against the Ibrahims, was sufficient to allow a rational trier of fact to conclude that defendant acted with the requisite intent when he fired at Tarza.

Defendant also challenges the sufficiency of evidence to sustain his conviction of kidnapping Shukra Ulfat. Defendant claims that because his victim voluntarily came to the Ibrahim apartment following the shooting and was thereafter simply not permitted to leave, the required element of asportation was lacking and thus he could not be lawfully convicted of kidnapping on the premise of a forcible confinement. We disagree.

“A person can be convicted of kidnapping if it is proved beyond a reasonable doubt that the person wilfully, maliciously, and without lawful authority, forcibly or secretly confined or imprisoned any other person within this state against the other person's will.” *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), *aff’d in part, rev’d in part on other grounds* 462 Mich 415 (2000). See also MCL 750.349; MSA 28.581. In this case, defendant was charged with forcibly confining his victim within the Ibrahim apartment. “Although not mentioned in the statute, asportation of the victim is a judicially required element of the crime of kidnapping by forcible confinement or imprisonment.” *People v Green*, 228 Mich App 684, 696; 580 NW2d 444 (1998). “To establish the element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime *unless the underlying crime involves murder*,

extortion, or taking a hostage.” Id. at 696-697 (emphasis added; parens removed). Accord People v Adams, 389 Mich 222, 238; 205 NW2d 415 (1973).

At the time Ulfat was initially told that she would not be permitted to leave the apartment, defendant was aware that one of the victim’s daughters had escaped from the apartment during the shootings and thus was presumably also aware that the child would be summoning the police. Officer David Durrell, the first officer to arrive at the scene, testified that upon his arrival, defendant told him through the closed apartment door that he was holding several “hostages.” We believe that based on this evidence, a rational trier of fact could conclude that defendant had taken Ulfat as a hostage. Therefore, any movement incidental thereto would be sufficient to support the asportation requirement of the kidnapping charge. *People v Wesley*, 421 Mich 375, 396; 365 NW2d 692 (1984).

Both Ulfat and Tarza testified that after arriving at the apartment and finding Omer Ibrahim dead, Ulfat asked to leave but was told by defendant that she would not be permitted to do so. Defendant then, with gun in hand, waved Ulfat to a chair in which she was instructed to sit. We conclude that this testimony was sufficient to allow a rational factfinder to conclude that there was movement sufficient to satisfy the asportation requirement beyond a reasonable doubt. *Id.*

Next, defendant argues that the trial court abused its discretion by admitting, for purposes of impeachment, evidence of defendant’s prior felony conviction of intimidating a witness in the state of New York. “The trial court’s decision to allow impeachment by evidence of a prior conviction is within its sound discretion and will not be reversed on appeal absent an abuse of that discretion.” *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). While we agree that admission of the prior conviction was error, we find such error to be harmless.

“A witness’ credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, but only if the criteria set forth in MRE 609 are satisfied.” *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Under MRE 609,

the trial judge’s first task . . . [is] to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. [*People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988).]

Defendant argues that the trial court erred in finding that the crime of intimidating a witness falls within these parameters, because that crime does not contain a specific element of false statement or dishonesty within the meaning of MRE 609(a)(1).² We agree.

² No assertion has been made that the crime of intimidating a witness contains an element of theft. Therefore, the second step of the *Allen* analysis is not applicable.

As noted by defendant, our Supreme Court in *Allen* made clear that the admissibility of a prior conviction under MRE 609 is to be determined by reference to the elements of the crime at issue:

In order to avoid confusion in our courts, we have drafted the new rule so as to make clear that prior convictions are only to be admitted where dishonesty or false statement is an *actual element of the offense in question*. This is consistent with the fact that juries do not reach decisions as to how a crime was committed unless such is an element of the offense, e.g., larceny by false pretenses. [*Allen, supra* at 594, n 15 (emphasis added).]

The crime of intimidating a witness does not require proof that defendant himself lied or was otherwise deceitful, i.e., it is not a crime involving an element which reflects directly upon the witness' propensity to himself testify truthfully. Therefore, we believe that the trial court erred in admitting the conviction for purposes of impeachment under MRE 609.

Nonetheless, we conclude that when the nature of this evidentiary error is weighed in light of the properly admitted evidence, defendant cannot establish "that it is more probable than not that the outcome would have been different without this error." *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999).³ The evidence showed that defendant returned to the Ibrahim apartment with a concealed weapon after arguing with Omer and Tarza, that he shot Omer directly in the eye, and that he had to significantly change his point of aim to fire again at Tarza. Accordingly, while we believe that the trial court erred in admitting evidence of defendant's prior conviction, we conclude that the error does not justify reversal of defendant's convictions.

Finally, defendant argues that he was deprived of his right to a fair trial by the prosecutor's improper use during closing argument of facts either not in evidence or which had been stricken from the record. Because defendant did not object at trial to the alleged misconduct, we review for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]). Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the

³ Defendant does not specify in his brief on appeal which convictions are allegedly undermined by this evidence. However, because his argument focuses on the prosecution's alleged failure to establish the requisite intent, we proceed on the assumption that the convictions at issue are those where his other challenges involve the element of intent, i.e., the murder and assault with intent convictions.

prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

Defendant asserts that during closing argument the prosecutor erroneously stated that on the day of the shootings, Nazira Ibrahim, Omer's wife and Tarza's mother, had spoken with police concerning defendant's prior threatening behavior. A review of Nazira's testimony reveals that she did not make the statement attributed to her by the prosecutor. Thus, defendant has established that a plain error occurred. *Carines, supra* at 763. However, defendant has failed to show either that he was prejudiced by the remarks or that the error adversely affected the integrity and fairness of the trial. *Id.* at 763-764.

In addition to testimony from other members of the Ibrahim family concerning defendant's threats and harassment before the shootings, the prosecutor offered the testimony of Moustaffa Eissa, an Ibrahim family friend, as well as that of Officer David Struve. Both these witnesses indicated that during the time shortly before the shootings, they each had had conversations with defendant concerning complaints the Ibrahims had levied about defendant's conduct toward them. Thus, the testimony erroneously attributed to Nazira was merely cumulative to the point sought to be made by the prosecution, i.e., that defendant had for a period before the shootings threatened or otherwise harassed the Ibrahim family.

Moreover, had defendant made a timely objection, any prejudicial effect that may have existed could have been eliminated by a curative instruction. *Schutte, supra* at 721; *People v Byrd*, 133 Mich App 767, 781; 350 NW2d 802 (1984). "Absent an objection, 'the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice.'" *Schutte, supra* at 721-722, quoting *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Further, defendant does not allege, and there is no evidence, that the prosecutor acted in bad faith. "Misstatements should not be held to be prejudicial if they are made in good faith and, when fairly construed, they do not appear to have been such as would influence the jury adversely to the rights of the accused." *Byrd, supra* at 780-781.

Defendant also asserts that he was denied a fair trial when the prosecutor improperly argued facts which had been stricken by the trial court from the record. This contention stems from the prosecutor's attempt during rebuttal to elicit a statement from Moustaffa Eissa that Omer Ibrahim had, before the shootings, told Eissa that he was fearful of defendant. Again, while defendant has established that a plain error occurred, he fails to show either the requisite prejudice or that the integrity of the trial was compromised. *Carines, supra* at 763. Moreover, we conclude that had any prejudice occurred, it "could have been eliminated had a curative instruction been given following a timely objection." *Schutte, supra* at 721. Absent a miscarriage of justice, appellate review is precluded. See *Carines, supra*.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski